MITTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 465

COFFIN BROS. & CO., R. J. DIXON, R. L. GILLEN, ET AL., PLAINTIFFS IN ERROR,

vs.

T. R. BENNETT, SUPERINTENDENT OF BANKS FOR THE STATE OF GEORGIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

FILED AUGUST 30, 1927

(32,917)

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[fols. 1 & 2] **IN SUPREME COURT OF GEORGIA**

WRIT OF ERROR

UNITED STATES OF AMERICA, SS:

The President of the United States of America to the Honorable the Judges of the[1] Supreme Court of the State of Georgia, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in said Supreme Court of the State of Georgia being the highest court of the said State in which a decision in the cause could be had, between Coffin Bros. & Co., (a partnership composed of J. E., L. R., and Z. L. Coffin), R. J. Dixon, R. L. Gillen, Mrs. Edna M. Ponder, J. W. Bell, N. C. Coffin, M. G. Richardson, R. T. Humber, J. E. and L. R. Coffin, Mrs. T. N. McGarrah, W. M. Etheridge, W. M. Etheridge and Warren Jowers as executors of will of Mrs. Lizzie Harrell, Mrs. Frances Fitzgerald, E. I. Carter, W. A. Colbert, J. E. French, O. V. Lamar, N. C. Alston, R. T. Dixon, Richland Home Mixture Guano Co., J. C. Dixon, J. F. Humber, J. L. Etheridge, Louise Etheridge, Grace Etheridge, R. J. Dixon and J. E. French as executors of the will of T. A. H. Meyer, Mrs. Fannie Ponder, W. W. Binion, E. W. Childs, and A. C. Reid, as plaintiffs in error, and T. R. Bennett, Superintendent of Banks for the State of Georgia, as defendant in error, wherein was drawn in question the validity of a statute of [fols. 3-16] a State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity;[2] it appears that the said plaintiffs in error above named are entitled to have the said judgment reviewed by the Supreme Court

[1] The writ should be directed to the judges of the court of last resort whose judgment is to be reviewed, save where the record has been remitted to and remains in the lower court, in which event the writ may be directed to the judges of the lower court as a means of getting the record. See Atherton v. Fowler, 91 U. S. 143, 146; Sioux Remedy Co. v. Cope, 235 U. S. 197, 200.

[2] If only one of these jurisdictional grounds exists in the case, strike out the other.

of the United States; and they having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and twenty-seven.

O. C. Fuller, Clerk of the[3] District Court of the United States for the Northern District of Georgia. (Seal U. S. District Court.)

Allowed by[4] Richard B. Russell, Chief Justice Supreme Court of Georgia.

Filed in office July 16, 1927. J. D. Harrison, Clerk.

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[3] The writ may be signed and issued by the clerk of the district court of the United States for that district or the clerk of the Supreme Court of the United States.

[4] The writ may be allowed by the chief justice or presiding judge of the state court whose judgment is to be reviewed or a justice of the Supreme Court of the United States.

[fol. 17] IN SUPREME COURT OF GEORGIA

5753

COFFIN BROS. & CO. et al.

v.

T. R. BENNETT, Supt., etc.

JUDGMENT—June 20, 1927

This cause came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 18] IN SUPREME COURT OF GEORGIA

[Title omitted]

OPINION—June 20, 1927

By the Court, HINES, J.:

1. Section 20 of article 7 of the act of August 16, 1919 (Acts 1919, p. 135), creating the department of banking of the State of Georgia, as amended by the act of August 25, 1925 (Acts 1925, p. 119), does not provide for rendition of judgments in personam against the stockholders of banks which the superintendent of banks has taken control of for the purpose of liquidation, but provides only for summary issuance of executions against stockholders of such banks, as a mode only of commencing against them suits to enforce their statutory liability to depositors (Heard v. Sibley, 52 Ga. 310; Stone v. Davidson, 56 Ga. 179, 182; Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626); and as this section as amended accords to such stockholders the right to contest by affidavits of illegality their liability for the assessments levied by the superintendent of banks, and the amount and necessity thereof, it is not unconstitutional as denying such stockholders due process of law. Roberts v. Dancer, 144 Ga. 341 (87 S. E. 287).

2. This section as amended does not violate paragraph 23, of section 1, of article 1, of the constitution of this State, which provides, in part, that "The legislative, judicial, and executive powers shall forever remain separate and distinct." The power conferred by this section upon the bank superintendent to levy assessments and to issue summary executions, under this section, against stockholders of insolvent banks, is not judicial, but is ministerial and executive. Scofield v. Perkerson, 46 Ga. 325; Price v. Hamilton, 146 Ga. 705 (2) (92 S. E. 62); Barnard v. Dupree, 149 Ga. 796 (102 S. E. 422); Badger v. State, 154 [fol. 19] Ga. 443 (114 S. E. 635; Goolsby v. Board of Drainage Commissioners, 156 Ga. 213 (119 S. E. 644); Fite v. Henson, 157 Ga. 679 (122 S. E. 412).

Judgment affirmed. All the Justices concur.

[fol. 20] In Superior Court of Fulton County

Bill of Exceptions—Filed November 19, 1926; in Supreme Court December 6, 1926

Be it remembered that on November 4th, 1926, in the Superior Court of Fulton County, Georgia, there came on to be heard before the Honorable E. E. Pomeroy, Judge of said Court, at an interlocutory hearing the case of Coffin Bros. & Co., (a partnership composed of J. E. Coffin, L. R. Coffin, and Z. L. Coffin), R. J. Dixon, R. L. Gillen, Mrs. Edna M. Ponder, J. W. Bell, N. C. Coffin, M. G. Richardson, R. T. Humber, J. E. and L. R. Coffin, Mrs. T. H. McGarrah, W. M. Etheridge, W. M. Etheridge and Warren Jowers as executors of Mrs. Lizzie Harrell, Mrs. Frances Fitzgerald, E. I. Carter, W. A. Colbert, J. E. French, O. V. Lamar, N. C. Alsten, R. T. Dixon, Richland Home Mixture Guano Co., J. C. Dixon, J. F. Humber, J. L. Etheridge, Louise Etheridge, Grace Etheridge, R. J. Dixon and J. E. French, as executors of T. A. H. Meyer, Mrs. Fannie Ponder, W. W. Binion, E. W. Childs, and A. C. Reid vs. T. R. Bennett, Superintendent of Banks, the same being a petition for injunction pending in said court, on which a temporary restraining order had been granted previously,

said case being heard on the petition, demurrer and answer.

At said interlocutory hearing on said Nov. 4, 1926, after full argument had, said judge passed an order refusing an injunction in said case and dissolving the temporary injunction or restraining order theretofore granted on the ground that the demurrer filed by defendant to plaintiffs' petition was good.

To this ruling, order, and judgment, your petitioners then and there excepted and now except and assign the same error on the ground that it was contrary to law, and aver that said demurrer was not good but that the same should have been overruled on each and every ground thereof, and said injunction should as a matter of law have been granted, all of the material facts being admitted by de- [fol. 21] fendant's answer, and showing as plaintiffs aver that the statute under which defendant is proceeding is unconstitutional for the reasons set out in plaintiffs' petition and the amendment thereto, and said Court erred in refusing the injunction sought on all the grounds and prayers of the petition.

Plaintiffs in error specify as material to a clear understanding of the errors complained of the following portions of the record, to wit:

1. The petition (omitting process and service).

2. The amendment to the petition.

3. The temporary restraining order.

4. The demurrer of defendant.

5. The answer of defendant.

6. The order of the judge refusing the injunction and dissolving the temporary restraining order.

And now come the plaintiffs herein named at the beginning of this bill of exceptions and, as plaintiffs in error, present within the time allowed by law their bill of exceptions, making the said T. R. Bennett, Superintendent of Banks, defendant in error in said bill of exceptions, and pray that the same may be signed and certified in order

that the errors complained of may be considered and corrected.

This Nov. 18, 1926.

G. Y. Harrell, R. L. Gillen, R. S. Wimberly, Attorneys for All of Plaintiffs in Error.

Post Office address: Lumpkin, Ga.

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of Fulton Superior Court is hereby ordered to make out a complete copy of such parts of the record in said case as are in [fol. 22] this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court that the errors alleged to have been committed may be considered and corrected.

This Nov. 19th, 1926.

Edgar E. Pomeroy, J. S. C. A. C.

GEORGIA,

Fulton County:

Due and legal service acknowledged, copy received, and all other and further service waived.

This the 19th day of November, 1926.

C. N. Davie, O. A. Park, C. S. Reid, Attys. for T. R. Bennett, Supt. of Banks.

[File endorsement omitted.]

[fol. 23] Certificate to foregoing paper omitted in printing.

[fol. 23½] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed October 13, 1926

The petition of the following named persons owning respectively the number of shares of stock in the Bank of

Richland (now known as the Richland State Bank) set opposite their names:

Coffin Bros. & Co., a partnership composed of J. E., L. R. and Z. L. Coffin	8	Shares.
R. J. Dixon	13½	"
R. L. Gillen	5	"
Mrs. Edna M. Ponder	4	"
J. W. Bell	4½	"
N. C. Coffin	15½	"
M. G. Richardson	3	"
R. T. Humber	5	"
J. E. and L. R. Coffin	3½	"
Mrs. T. H. McGarrah	1	"
W. M. Etheridge	4½	"
W. M. Etheridge and Warren Jowers as extrs. of Mrs. Lizzie Harrell	32	"
Mrs. Frances Fitzgerald	9	"
E. I. Carter	9	"
W. A. Colbert	16	"
J. E. French	7	"
O. V. Lamar	12½	"
N. C. Alston	40½	"
R. T. Dixon	6	"
Richland Home Mixture Guano Co.	1	"
J. C. Dixon	5	"
J. F. Humber	½	"
J. L. Etheridge	8	"
Louise Etheridge	8	"
Grace Etheridge	8	"
R. J. Dixon and J. E. French as extrs. of A. H. Meyer	2½	"
[fol. 24] Mrs. Fannie Ponder	2½	"
W. W. Binion	5	"
E. W. Childs	2½	"
A. C. Reid	2	"

respectfully shows:

1. That T. R. Bennett, is Superintendent of Banks for the State of Georgia, and is a resident of the County of Fulton, and subject to the jurisdiction of this court.

2. That on July 14, 1926, the Richland State Bank (a banking association organized under the laws of said State)

of Richland, Ga., closed its doors, and turned its affairs over to said superintendent, who has since been in charge of said bank.

3. Petitioners are all stockholders in said bank and own respectively the number of shares set opposite their names in the first paragraph of this petition, said shares being of the par value of one hundred dollars each.

4. That on Sept. 13, 1926, said defendant mailed or caused to be mailed to each of your petitioners a certain notice, one of which is hereto attached and marked exhibit "A" and made a part of this petition, all of the others being identical with this one except as to name, number of shares and amount of assessment.

5. Your petitioners show that unless said defendant is restrained and enjoined by this Court, he will on the 13th of this month proceed to issue executions against your petitioners in accordance with said notice, that the same will immediately become a lien upon all the property of petitioners, and that defendant will then proceed to enforce the same by levy and sale of the property of petitioners to the irreparable damage of petitioners.

6. Your petitioners show that in taking this action and in making these assessments and issuing these executions, said defendant is exercising judicial functions and powers; [fol. 25] for that in doing this it was necessary for defendant to, and defendant did in fact, act as a jury in determining the extent of the liabilities of the bank, and in placing a value on the assets of the bank, and in deciding what additional amount above the assets of the bank would be required to pay the liabilities of the bank, and as a Court in rendering judgment against your petitioners and issuing execution against them, without any opportunity for a hearing being given to your petitioners, and without due process of law.

7. Your petitioners show that the said acts of the said defendant, and so much of the Acts of the Legislature of 1919, page 180, as amended in 1925, as is codified in section 2268 (t) in volume 12 of Park's Annotated Code (under which said act of the legislature, known as the Banking Act said defendant is acting, and by authority of which

said section he is doing the acts herein complained of) are unconstitutional and in violation of article one, paragraph three of the Constitution of the State of Ga., which provides that no person shall be deprived of life, liberty or property except by due process of law; in that said acts of said defendant done under authority of said act of the legislature and said Act of the legislature which authorizes said defendant so to do, deprive petitioners of their property and of their right to use the same and of their liberty to contract with regard to the same, without due process of law; for that in the rendering of the judgments and the issuing of the executions fixing liens upon the property of petitioners, petitioners are deprived of their property without a hearing and without due process of law.

8. Petitioners show further that said acts of said defendant done by authority of said act of the legislature, and the said [fol. 25½] act of the legislature authorizing said acts of said defendant, are unconstitutional and in violation of article one, section one, paragraph 23 of the Constitution of the State of Georgia, which provides that the legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one, shall at the same time exercise the functions of either of the other; in that the defendant is an executive, administrative, or ministerial officer of said State, and the duties, powers and functions of his office properly belong to the executive department of the State, and not to the legislative or judicial department; but that the said defendant is nevertheless in the acts herein complained of done by authority of the statute herein complained of, exercising the functions belonging entirely to the judicial department of the State, and undertaking to discharge the officers of both judge and jury, in that he finds the amount of the liabilities of the bank, and the value of the assets of the bank, *and the value of the assets of the bank*, and renders judgment against your petitioners for his finding in the deficiency of assets as compared to liabilities.

9. Said acts of said defendant above set out and herein complained of, and said act of the legislature as codified in section 2268 (t) of the 12th Volume of Park's Annotated Code, are unconstitutional and in violation of paragraph

one of the 14th Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law; for that the said State of Georgia in authorizing its officer, said defendant, by said Act of the legislature, to render judgments against petitioners and thereupon [fol. 26] issue execution against them or to issue executions against them without any judgment being first rendered against them, and the placing of said liens upon the property of your petitioners, deprives your petitioners of their said property, and their right to use the same and liberty to contract with regard to the same, without any hearing and without due process of law.

10. Petitioners show that the inability of the said Richland State Bank to pay its depositors and creditors in full has not been judicially determined, and petitioners aver that the issuance and enforcement of any executions against them on their stockholders' statutory liability before a judicial determination of these facts is without due process of law, and the usurpation of this authority by said defendant is unconstitutional and violative of all the constitutional provisions above cited.

11. Petitioners show that the right to contest the assessments by affidavit of illegality provided for in the act of 1925 and codified in said section 2268 (t) of Vol. 12, Park's Annotated Code, is not a compliance with the constitutional requirements of due process of law, in that it provides for a hearing after judgment instead of before judgment, and after petitioners' property has been taken instead of before it has been taken, and after the placing of a lien upon petitioner's property without due process of law; and petitioners show that they have no adequate remedy at law.

12. Petitioners show that for the reasons above set out, and also to avoid a multiplicity of suits to enforce a common right with a defense common to all, which would be required if petitioners have to defend by affidavits of illegality, they are entitled to the writ of injunction.

[fol. 27] Wherefore, waiving discovery, petitioners pray:

1. That said defendant be enjoined from issuing said executions against these petitioners and from taking any

further action towards the collection or enforcement of the assessments referred to until judicial determination of petitioners' liability therefor.

2. That until a hearing of this case, said defendant be temporarily restrained from so doing.

3. That process issue requiring said defendant to be and appear at the next term of this court to answer this petition.

4. That petitioners have such other and further relief as to the Court shall seem meet and proper.

And petitioners will ever pray.

G. Y. Harrell, R. L. Gillen, R. S. Wimberly, Attys. for Petitioners.

EXHIBIT "A" TO PETITION

Office of the Superintendent of Bank of the State of Ga.

Atlanta, Sept. 13, 1926.

To N. C. Coffin, Richland, Ga.:

Whereas, under the provisions of the Banking Law of the State of Georgia, approved on August 16, 1919, it has been found necessary on the part of the Superintendent of Banks of said State of Ga., to take charge of and liquidate the affairs of the Richland State Bank of Richland, Ga., and,

Whereas, it is provided by Section 20, Article 7 of said Act aforesaid that:

"Within ninety days after the Superintendent of Banks has taken possession of the assets and business of any bank he shall make a careful estimate of the value of cash [fol. 28] assets of said bnak which can probably be converted into cash within one year after so taking possession of the assets and business of said bank and of the amount of such cash assets which will be available to pay depositors; and he shall immediately thereupon make an assessment upon the stockholders of said bank sufficient, when added to the cash assets so available for depositors, to pay the said depositors in full, provided that such assess-

ment shall not exceed the liability of stockholders upon their said stock."

Now, therefore, You as a stockholder of said Bank, are hereby notified that an assessment has been and the same is hereby levied, pro rata, upon each and every of the stockholders of said Bank, of 100 per centum of their said stockholders in said bank, upon the basis of $50,000.00 capitalization, which said assessment is necessary to pay depositors in full.

The said assessment hereby made must be paid to the undersigned, or to the Liquidating Agent in charge of the affairs of said Bank, representing the Superintendent of Banks of the State of Ga., within thirty days from this date, and receipt of this notice, this date being hereby made the date of levy of said assessment. Upon the failure to pay this assessment within the time designated, an execution will be issued by the Superintendent of Banks of the State of Ga., against you and each and every such stockholder so failing to meet the assessment hereby levied, as by such Act provided.

You hold 15½ shares. Your assessment is $1,550.00.

Witness my hand and seal this 13th day of Sept. 1926.

T. R. Bennett, Supt. of Banks. W. J. Davis, General Agt. Supt. of Banks of the State of Ga.

[fol. 29] *Duly sworn to by Z. L. Coffin et al. Jurat omitted in printing.*

IN SUPERIOR COURT OF FULTON COUNTY

ORDER TO SHOW CAUSE—Filed October 13, 1926

The above and foregoing petition read and considered, and it appearing by sworn allegations that the statements of fact in said petition are true, it is ordered that the defendant T. R. Bennett, as superintendent of banks of the State of Ga., show cause before me at the Court House in Atlanta, Ga., on the 16th day of Oct., 1926, why the prayers of the petition should not be granted.

In the meantime and until the further order of the court, the defendant is restrained as prayed for in said petition.

Let said defendant be served at once with a copy of this petition and order.

So ordered this Oct. 12, 1926.

G. H. Howard, Judge S. C. A. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

DEMURRER—Filed November 2, 1926

Comes now the defendant, T. R. Bennett, Supt. of Banks, and demurs to the petition upon the following grounds:

[fol. 30] 1. Because no cause of action is set forth.

2. Because there is no equity in the petition.

3. Because the facts set up are not sufficient to entitle plaintiffs to the extraordinary equitable relief prayed.

4. Because the plaintiffs have a full, adequate and complete remedy at law.

5. Because the Banking Act of 1919, as amended by the Act of August 26, 1925, is not unconstitutional for any of the reasons set forth in the petition.

Wherefore, Defendant prays that these, his grounds of demurrer may be inquired of by the Court, and that the petition may be dismissed.

Orville A. Park, C. N. Davis, C. S. Reid, Def't's Attys.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

ANSWER—Filed November 2, 1926

Comes now the defendant, T. R. Bennett, as Superintendent of Banks for the State of Ga., and in answer to the petition in the above stated case says:

1. Defendant admits Paragraphs 1, 2, 3, and 4 of the petition.

2. Answering Paragraph 5, Defendant admits that he would have issued executions against Petitioners in accordance with the notice served on them if he had not been restrained from so doing by the order of the Court entered in this case.

3. Answering Paragraph 6, Defendant denies that in making these assessments and issuing executions thereon, De-
[fol. 31] fendant would have exercised judicial functions and powers or would have acted as a court in rendering judgments against Petitioners.

He avers that as an administrative officer he was acting in compliance with the authority vested in him under the banking Act of 1919, as amended by the Act of 1925.

4. Defendant is advised that Paragraphs 7, 8, 9, 10, 11, and 12 set up no question of fact requiring special answer from this defendant. Defendant denies the legal conclusions therein set forth and especially that the Act of 1919, as amended by the Act of 1925, authorizing this defendant to assess the stockholders of an insolvent bank for the purpose of paying the depositors thereof and to issue executions against the stockholders for the collection of the assessments is unconstitutional for any of the reasons set up in said paragraphs, or either of them or for any other reason. Defendant admits that the inability of the Richland State Bank to pay its depositors in full had not been judicially determined, but defendant avers that it is not necessary that this inability should be determined by a court of law before making the assessment which this defendant in his official capacity as Superintendent of Banks, is authorized to do.

Defendant denies that Petitioners are without adequate remedy at law, and avers that the Banking Act as amended affords a simple inexpensive and efficient remedy to contest the assessments made by this Defendant as Superintendent of Banks.

And having fully answered, Defendant prays to be hence dismissed, with his reasonable costs.

Orville A. Park, C. N. Davis, C. S. Reid, Def't's Attys.

[fol. 32] *Duly sworn to by W. J. Davis. Jurat omitted in printing.*

[File endorsement omitted.]

In Superior Court of Fulton County

Amended Petition—Filed November 4, 1926

Come now the plaintiffs in the above stated case and amend their suit heretofore filed, by leave of the Court, by adding thereto the following allegations.

1. Your petitioners show to the Court that section 20 of article 7 of the State Banking Act of 1919, as amended by the act of 1925, and as it is now shown in Sup. to Park's Code, Vol. 12, section 2268 (t) and in the Michie Code of 1926 as section 2366 (71), is as follows:

Within 90 days after the Superintendent of Banks has taken possession of the assets of any bank, as in this act authorized, he shall make a careful estimate of the values of the cash assets and business of said bank which can probably be converted into cash within one year after so taking possession of the assets and business of said bank, and the amount of such cash assets which will be available to pay depositors and he shall immediately thereupon make an assessment upon the stockholders of said bank sufficient, when added to the cash assets so available for depositors, to pay the said depositors in full provided that such assess- [fol. 33] ment shall not exceed the liability of stockholders upon their said stock. Notice of such assessments shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment within thirty days after the levy of such assessment and notice thereof, the superintendent of banks shall issue an execution against such stockholders for the amount of such assessment, which shall be enforced in like manner as executions issued by the superior courts of this State upon judgments regularly rendered by said courts, provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions to contest his liability for such assessment and the amount and necessity thereof. Whereas affidavit of illegality is filed with the levying officer he shall return the same, together with the execution, to the superior court of the county of the residence of the stockholder to be there tried as illegalities filed to executions issued on judgments rendered by said courts are tried.

Said executions shall be a lien on all property of the defendant subject to levy and sale for the amount which shall be adjudged to be due thereon from the date of the issuance thereof by the superintendent. If at any time prior to the final payment of all indebtedness of such bank it shall appear to the Superintendent that the assessment made by him is insufficient in amount to pay such depositors in full, said superintendent may from time to time make other assessments not in excess of the liability of the stockholders upon their stock, which shall be enforced and collected in like manner.

After all the indebtedness of such bank is paid in full, the remaining assets of such bank shall be applied first to reimbursing the stockholders who have paid such assessment [fol. 34] or assessments, and thereafter pro-rata to all the stockholders.

Provided, however, that the lien provided for in this section shall not be good as against third persons without actual notice of the same, until the said execution has been entered on the General Execution Docket in the office of the Clerk of the Superior Court in the County of the defendant's residence, and as to the real estate of the defendant, in the county where the land lies.

2. Your petitioners aver that the foregoing section violates the due process clause of the State Constitution and the same clause of the United States Constitution (as the same are set out in the original petition) in the following particulars:

(a) In authorizing in effect the rendition of a judgment against stockholders without notice and without a hearing.

(b) In providing in so far as notice is provided for at all in the proceedings, for the notice of the law of admiralty instead of for the service of the process of the common law.

(c) In issuing executions in personam before trial, and without first having personal service of process.

(d) By making this execution a lien on all of defendants' property and depriving them of the use of it, and of the right to pledge or sell it, before they have had any day in court or any opportunity to be heard.

(e) In failing to give him any opportunity to make defense after receipt of the notice sent by mail, if it should be

received, until after an execution has been issued against him.

(f) By making it easily possible for the property of defendant's to be actually sold (if real estate) under execution before defendants ever hear of the proceeding at all. [fol. 35] (g) By making all of the proceedings in a matter where a personal judgment is sought appropriate to a proceeding in rem and not to a proceeding in personam.

3. Your petitioners aver that the foregoing section set out in the first paragraph of this amendment violates the clause of the State Constitution requiring the separation of executive, legislative and judicial powers, as set out in the original petition, in the following particulars.

(a) Because it authorizes an executive functionary to render judgment as to the value of the assets of the bank, the amount of liabilities and what part of this due to depositors, the amount of expense, and the percentage of assessment required to make up the deficit.

(b) Because it authorizes this official to render judgment against each defendant as to his being a stockholder and liable for a certain part of this amount.

(c) Because it authorizes him to send out some sort of notice apparently intended to take the place of process.

(d) Because it authorizes him to issue executions which shall have the same force and effect as executions issued from the superior courts on judgments regularly rendered in said Courts.

Your petitioners aver that all of the foregoing are judicial powers and functions which are by this act and section vested in an executive or administrative official, and that said section of said act therefore and thereby violates the said section of the Constitution of Georgia, to wit: section one, paragraph 23 of Article one.

4. And finally, your petitioners aver that the whole scheme of this section of the banking act by which the superintendent of banks is authorized to take the place of and act as parties, witnesses, judge, jury, and the clerk of the court; so as to render a judgment or something to [fol. 36] take the place of one on which an execution could issue; and to find his verdict as the amount of a stockholder's liability on evidence produced by him in a pro-

ceedings at his instance, and then render judgment thereon against the stockholder, and then issue an execution in personam against the stockholders, and all this without giving the stockholder any opportunity to be heard, or any notice of any kind except a notice by mail which he might not receive, and which notice does not give him the right to appear anywhere and make any contest; and then provides that this execution shall immediately become alien upon all of the stockholder's property, so that he cannot thereafter pledge or sell or dispute of the same, and further that the property can be levied on and sold under this execution of which the stockholder might have no notice, and in the case of stockholders living in other counties and owning real estate in the county of the bank's location, might easily result in the sale of the said real estate of such stockholders under such execution before the stockholders ever heard of the proceeding in any way;—violates every principle of due process of law and the law of the land, and utterly fails to give to the stockholder the process of the common law, and renders judgment and execution against him before any court of any kind has ever acquired jurisdiction of him in any way; and is in direct contravention of and violation of the 14th Amendment to the Constitution of the United States which provides that no person shall be deprived of life, liberty or property without due process of law, and of the same provision in Article One, Section One, paragraph Three of the Constitution of the State of Georgia, and of the provision in Article One, Section One, Paragraph 23 of the Constitution of Georgia that the legislative, executive and judicial department shall forever remain separate and distinct, and no official of one [fol. 37] department shall discharge the functions or powers of another.

And petitioners pray the allowance of this amendment.

R. L. Gillen, G. Y. Harrell, R. S. Wimberly.

Duly sworn to by R. L. Gillen and J. W. Bell. Jurat omitted in printing.

The foregoing amendment is hereby allowed. This Nov. 4, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

[File endorsement omitted.]

In Superior Court of Fulton County

In Open Court, Atlanta, Ga., Nov. 4th, 1926

Order Sustaining Demurrer

The hearing of the within demurrer coming on in its regular order, under the rule nisi granted upon the petition, now then after hearing argument and upon consideration of the same it is ordered that the general demurrer to the petition as amended be and the same is hereby sustained, [fols. 38-40] and the injunction as prayed for is denied.

Edgar E. Pomeroy, Judge S. C. A. C.

In Superior Court of Fulton County

Judgment

Counsel for plaintiffs having advised the court of their intention of appealing from the judgment of this court, in sustaining the general demurrer to the petition and having made application for a stay thereof pending the presentation of a bill of exceptions; it is ordered that the Superintendent of Banks, be and he is hereby authorized to issue the executions of this day and to place the same upon the General Execution Dockets of the Superior Courts of the counties of the residence of the plaintiff after the expiration of nine days from this date, it is further ordered that in the event that the plaintiffs or either of them give a good and solvent bond to be approved by the Clerk of the Superior Court of this county, conditioned to pay the amount finally adjudged to be due upon their liability as stockholders of the bank described in said petition, then said execution against such stockholder shall not be placed upon the general Execution docket of the county of the stockholders' residence pending the final determination of this issue. As further condition said bond shall be that judgment shall be entered against the principal and the sureties in this proceeding upon the final determination thereof and without the necessity for suit or further proceeding thereon. Each stockholder's bond to be liable only for the amount due as such stockholder. In the said case is appealed and as to those stockholders who do appeal but do not give the bond described in this order the

executions are not to be levied until the issues are finally determined.

Nov. 4th, 1926.

Edgar E. Pomeroy, Judge S. C. A. C.

[fol. 41] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed August 29, 1927

Now come the Plaintiffs in Error in the above styled case, and in compliance with paragraph 9 of Rule 10 of the Supreme Court of the United States, designate the points to be relied upon and the parts of the record necessary to be printed for a consideration thereof. Plaintiffs in Error designate the following points to be relied upon:

1

That Section 20 of Article 7 of the State Banking Act of 1919 as amended by the Act of 1925 is invalid and repugnant to and in contravention of the 14th Amendment to the Constitution of the United States in that:

(a) Said Act deprives your petitioners of their property without due process of law in that, without any trial or hearing or process of law of any kind, the Superintendent of Banks is given a lien upon all of your petitioners' property;

(b) For that said Act also deprives your petitioners of their property without due process of law, in that it authorizes the said Superintendent of Banks, after issuing execution against your petitioners and acquiring a general lien on all of their property without any hearing, to proceed further and levy upon and sell any of petitioners' real estate, without any notice to them or any judicial proceed-[fol. 42] ing or process of any kind.

2

That said Act is unconstitutional and in violation of the said 14th Amendment to the Constitution of the United States, in that it deprives petitioners of their property without due process of law, because it does not provide for any

judicial proceeding of any kind until after a general judgment or an execution, having the same effect as one issued on a general judgment is obtained against petitioners.

3

Said Act of the Legislature is unconstitutional because it deprives petitioners of their property without due process of law in that it provides for obtaining a general judgment or execution against them in a manner entirely foreign to the law of the land or the spirit of English jurisprudence.

And petitioners designate as necessary for a consideration of the points relied upon in this case the following parts of the record to be printed therein:

1. The original Petition;
2. The Amendment to the Petition;
3. Defendant's Demurrer;
4. Defendant's Answer;
5. The Judgment of Fulton Superior Court;
6. The Bill of Exceptions from Fulton Superior Court to the Supreme Court of Georgia;
7. The Judgment of the Supreme Court of Georgia;
8. The Opinion of the Supreme Court of Georgia.

Geo. Y. Harrell, R. S. Wimberly, Counsel for Plaintiffs in Error.

[fols. 43 & 44] Due and legal service of the foregoing designation of points and record acknowledged.

This the 26th day of August, 1927.

C. N. Davie, Counsel for Defendant in Error.

[fol. 45] [File endorsement omitted.]

Endorsed on cover: File No. 32,917. Georgia Supreme Court. Term No. 465. Coffin Bros. & Co., R. J. Dixon, R. L. Gillen, et al., plaintiffs in error, vs. T. R. Bennett, superintendent of banks for the State of Georgia. Filed August 20, 1927. File No. 32,917.

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 695

COFFIN BROS. & CO., R. J. DIXON, R. L. GILLEY et al., Plaintiffs in Error,

v.

T. E. BENNETT, superintendent of Banks for the State of Georgia, Defendant in Error.

In Error to the Supreme Court of the State of Georgia

BRIEF

FOR PLAINTIFFS IN ERROR

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 465

COFFIN BROS. & CO., R. J. DIXON, R. L. GILLEN, et al., Plaintiffs in Error,

vs.

T. R. BENNETT, Superintendent of Banks FOR THE STATE OF GEORGIA Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PLAINTIFFS IN ERROR

The opinion of the Supreme Court of Georgia in this case will be found reported in Volume 164, page 350.

The judgment sought to be reviewed is one rendered by the Superior Court of Fulton County, Georgia, on November 4th, 1926 (R. 19).

The contention was made in this court by Plaintiffs in Error, Plaintiffs below, that section 20 of article 7 of the State Banking Act of 1919 as amended by the Act of 1925, now shown in supplement to Parks Code Vol. 12 as Sec. 2268 (t) and in the Michie Code of 1926 as Sec. 2366 (71), which is as follows:

> "Within 90 days after the Superintendent of Banks has taken possession of the assets of any bank, as in this act authorized, he shall make a careful estimate of the cash assets and business of said bank which can probably be coverted into cash within one year after so taking possession of the assets and business of said bank, and the

amount of such cash assets as will be available to pay depositors and he shall immediately thereupon make an assessment upon the stockholders of said bank sufficient, when added to the cash assets so available for depositors, to pay the said depositors in full provided that such assessment shall not exceed the liability of stockholders upon their said stock. Notice of such assessment shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment and notice thereof, the superintendent of banks shall issue an execution against such stockholders for the amount of such assessment, which shall be enforced in like manner as executions issued by the superior courts of this state upon judgments regularly rendered by said courts, provided, however that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions to contest his liability for such assessment and the amount and necessity thereof. Where an affidavit of illegality is filed with the levying officer he shall return the same, together with the execution, to the superior court of the county of the residence of the stockholder to be there tried as illegalities filed to executions issued on judgments rendered by said courts are tried.

"Said executions shall be a lien on all property of the defendant subject to levy and sale for the amount which shall be adjudged to be due thereon from the date of the issuance thereof by the superintendent. If at any time prior to the final payment of all indebtedness of such bank it shall appear to the Superintendent that the assessment made by him is insufficient in amount to pay such depositors in full, said superintendent may from time to time make other assessments not in excess of the liability of the stockholders upon their stock, which shall be enforced and collected in like manner. After all the indebtedness of such bank is paid in full, the remaining assets of such

bank shall be applied first to reimbursing the stockholders who have paid such assessment or assessments, and thereafter pro-rata to all the stockholders.

"Provided, however, that the lien provided for in this section shall not be good as against third persons without actual notice of the same, until the said execution has been entered on the General Execution Docket in the office of the Clerk of the Superior Court in the County of the defendant's residence, and as to the real estate of the defendant, in the county where the land lies;"

was in contravention of and in violation of the due process clause of the United States Constitution, and this contention of plaintiffs was denied by the court, and the validity and constitutionality sustained. (R. 15-17, 19). The jurisdiction of the Supreme Court of the United States is invoked therefore on account of the fact that a State statute is attacked as violative of a clause of the Constitution of the United States, and the said point was decided against plaintiffs in the court below. See the following cases as sustaining the jurisdiction:

North Carolina R. Co. vs. Story, 268 U. S. 288.
Tippecanoe County vs. Lucas, 93 U. S. 108, 113.
Palmetto Fire Ins. Co. vs. Conn, 272 U. S. 295.
Western Turf Assn. vs. Greenberg, 204 U. S. 359.

I.

STATEMENT OF THE CASE.

The plaintiffs below brought an injunction in Fulton Superior Court to restrain the issuing and levying of executions by the Superintendent of Banks of the State of Georgia to enforce the stockholders liability of plaintiffs in the Richland State Bank (R. 6-12). On the trial of the case plaintiffs offered and had allowed an amendment to their petition setting out more fully their contentions (R. 15-18).

In this petition and amendment plaintiffs attacked as unconstitutional the section of the Banking Act of Georgia above set out in this brief and particularly the following provisions of said Statute:

> "Notice of such assessments shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment within thirty days after the levy of such assessment and notice thereof, the superintendent of banks shall issue an execution against such stockholders for the amount of such assessment, which shall be enforced in like manner as executions issued by the superior courts of this State upon judgments regularly rendered by said courts, provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions to contest his liability for such assessment and the amount and necessity thereof,"

on the ground that it was contrary to par. 1 of the 14th amendment to the Constitution of the United States which

provides that no State shall deprive any person of life, liberty or property without due process of law. (R. 9-10, 16-17).

In Georgia a judgment of a superior court is a lien on all the property of the defendant. Sec. 5946 of the Code being as follows:

> "The judgments obtained in the superior, justices, and other courts of this State shall be of equal dignity and shall bind all the property of the defendant, both real and personal, from the date of such judgment except as otherwise provided in this Code."

The above quoted section of the Banking Act gives to the execution issued by the Superintendent of Banks the same force and effect as an execution based on a judgment regularly rendered by the superior court and thereby fastens a lien upon all the property of the defendant, preventing its sale or encumbrance, before any judicial action of any sort whatever has been taken or any judicial process has been issued.

The defendant, the Superintendent of Banks, filed his general demurrer to this petition of plaintiffs on the ground, among others, that the Banking Act was not unconstitutional for the reasons alleged (R. 13), and this demurrer was sustained by the Court and the injunction refused on this ground. (R. 19).

II.

SPECIFICATIONS OF ERROR.

The errors relied upon in this case are the following:

(1)

That Section 20 of Article 7 of the State Banking Act of 1919 as amended by the Act of 1925 is invalid and repugnant to and in contravention of the 14th Amendment to the Constitution of the United States in that:

(a) Said Act deprives your petitioners of their property without due process of law in that, without any trial or hearing or process of law of any kind, the Superintendent of Banks is given a lien upon all of your petitioner's property:

(b) For that said Act also deprives your petitioners of their property without due process of law, in that it authorizes the said Superintendent of Banks, after issuing execution against your petitioners and acquiring a general lien on all of their property without any hearing, to proceed further and levy upon and sell any of petitioners' real estate, without any notice to them or any judicial proceeding or process of any kind.

(2)

That said Act is unconstitutional and in violation of the 14th Amendment to the Constitution of the United States, in that it deprives petitioners of their property without due process of law, because it does not provide for any judicial proceeding of any kind until after a general judgment or an execution, having the same effect as one

issued on a general judgment, is obtained against petitioners.

(3)

Said Act of the Legislature is unconstitutional because it deprives petitioners of their property without due process of law in that it provides for obtaining a general judgment or execution against them in a manner entirely foreign to the law of the land or the spirit of English jurisprudence.

III.

BRIEF OF THE ARGUMENT.

(1)

Merely to state the question in this case is to show how revolutionary the proceeding of the superintendent of banks is as to all the accepted standards of the common law and of English and American jurisprudence. This official is authorized to sit in his office in Atlanta and issue executions by a mere stroke of the pen and without any semblance of a hearing or trial against citizens of every county in the state. We assert most positively that nothing like it or remotely resembling it was ever heard of before in English speaking countries.

It was certainly the general if not the universal rule at common law that all suits in personam must be begun

by the service of process by an officer of Court. In admiralty cases, which were proceedings in rem, and in other cases in rem, jurisdiction could be acquired and the suit begun by the seizure of property; but whenever a judgment purely in personam is sought, personal service upon defendant is indispensable.

Webster vs. Reid, 11 Howard 437.
6 R. C. L. 446-7.
Pennoyer vs. Neb. 95 U. S. 714.
Cooley's Const. Lim. (4th Edition) 503-6.
Sutton vs. Hancock, 113 Ga. 436, 442, 443.

In the well considered case of State vs. Guilbert, 56 Ohio State, 575, the court says:

> "To authorize a court to determine the adverse claims of parties touching their rights in things, judicial process is indispensable. Judicial process in its largest sense comprehends all of the acts of the court from the beginning of the proceeding until the end. In a narrower sense it is 'the means of compelling a defendant to appear in court after suing out the original writ, in civil, and after indictment in criminal cases.' (Bouvier's Law Dictionary). In every case it is the act of the Court."

While the due process guaranteed by the state and federal constitutions comprehends this broad definition, it also includes, of course, this narrower definition. And where in this proceeding is there any act of the court in beginning the proceeding?

Recognizing that some explanation of this curious state of affairs is necessary, counsel for defendant in error, say that the execution issued by the superintendent of

banks is merely a method of bringing the defendants into court and of initiating the proceedings to determine their rights, and satisfies the requirement of due process.

The answer to this contention of opposing counsel is two-fold: First; It is not true. The execution is not merely a proceeding to bring the defendant before the court. The statute provides in terms that the execution "shall be enforced in like manner as executions issued by the superior courts of this State upon judgments regularly rendered by said courts," and "said executions shall be a lien on all property of the defendant subject to levy and sale." This is a great deal more than bringing a defendant into court. It accomplishes all that can be accomplished by a final judgment and execution issued thereon, except that a method of trial is provided after the judgment or execution has issued.

Second: It does not resemble due process. Process is the beginning of the proceeding, not a final judgment nor an execution to take the place of an execution issued on a final judgment. It is the act of the Court. No court nor any person connected with any court acts in this case until the defendant brings his case to trial in the Superior Court by an affidavit of illegality filed by him to a paper coming from no court nor judicial tribunal of any character.

The process required by the Constitution is process at the beginning of the proceeding which shall issue and be served upon the defendant before any act is done to affect his rights. It is original notice whereby the court acquires jurisdiction and not notice of the time when jurisdiction already completely vested will be exercised.

6 R. C. L. 443.
Pennoyer vs. Neb. 95 U. S. 714.

Suits at the common law proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process or who voluntarily appear * * * The fact that process is not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered.

Cooley's Const. Lim. (4th Ed.) 505-6.

Opposing counsel seem to realize the need of some authority as we find here an execution in personam before there has been anything in the nature of process, and they cite two classes of cases: First, those proceedings in rem or quasi in rem where the court acquires jurisdiction of the defendant by seizing his property, which is always in contemplation of law in his possession; such as admiralty cases, attachment cases, and lien foreclosure cases. In the first two cases, the proceeding is begun by the act of a court at the beginning of the judicial proceedings, and these requirements are therefore answered. It is true that an execution or a similar writ issues before trial and judgment, but this is merely by way of making service, and a further judgment will be required and this judgment will not affect anything but the property seized unless jurisdiction over the person is acquired in some other way. In the case of foreclosure of liens, the lien is given either by contract or by law and not by the pen of some man in some far-away office, and the lien likewise affects only the property seized unless there is some personal jurisdiction otherwise obtained.

And in the second place, opposing counsel call attention to cases sustaining the right of the government to proceed for the collection of taxes and other claims in a summary way, and not according to what would be the requirement of due process of law as between persons.

This is one seeming exception to the general rule above referred to, but the explanation of this seeming contradiction is that the collection of taxes is primarily and properly not a part or proceeding of the judicial department of the State but of the executive.

McMahon vs. Palmer, 192 N. Y. 176,
50 Am. Rep. 796.
Schofield vs. Parkerson, 46 Ga. 350, 360.

So far as we know and can find out there was in countries where the English Common Law prevails no cases where a judgment could be obtained without service of process of the Court on the defendant other than the two above named; proceedings in rem and the collections of taxes; until these bank cases arose. We submit that the Act permitting this is contrary to the whole spirit of English Law and in direct violation of the will and spirit of the Constitutional provisions referred to.

Coe vs. Armour Fertilizer Works, 337 U. S. 413.

In the case of McMahon vs. Palmer, 102 N. Y. 176, supra, the Court says:

"The proceedings by which taxes have been assessed, levied and collected from the citizens have always been

regarded as administrative and not judicial, and to constitute due process of law within the meaning of the Constitution. Such proceedings have from necessity been exercised by governments during all times, by summary methods of procedure; and to require the deliberation and delay incidental to judicial proceedings in the exercise and enforcement of the taxing power would seriously cripple its efficiency, if not destroy its existence. These methods were in exercise and existence long before the adoption of the Constitution and have never been supposed to be affected thereby."

And the Georgia Court in Schofield vs. Perkerson, 46 Ga. 350, 360 (also cited supra) says:

"The issuing of the executions by the Comptroller General to collect the public revenue due the State, was the act of the department of the State, and the courts have no power or authority to compel that department by mandamus or other judicial process to issue execution for the collection of public revenue of the state, or to restrain that department of the state from doing so, or to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize it to issue such executions against the defaulting officers and agents of the government—that is a matter which belongs to the executive department of the government exclusively."

So this class of cases by no means holds that such a proceeding as the present one constitutes due process of law as between private persons, but on the contrary holds that this requirement does not apply to government cases. To the same effect and governed by the same principle is the case of Roberts vs. Dunder. 144 Ga. 341, cited below by defendant in error.

(2)

The due process clause of the federal constitution was first considered in the case of Murray vs. Hoboken Land Co., and this decision is quoted at some length in Taylor on Due Process of Law, pages 62-64, and we think it very pertinent and worth quoting here. The case arose over a distress warrant issued under the Act of May 15, 1820, by the solicitor of the treasury against a delinquent collector of customs for a balance found to be due in his accounts, and the question was whether this was "due process of law."

In the words of the Court:

"It must be admitted that, if the auditing of this account, and the ascertaining of its balance, and the issuing of this process, was an exercise of the judical power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judical power. *They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to exercise any of ministerial duties which arise out of judicial proceedings.* The question whether these acts were an exercise of the judicial power of the United States can best be considered under another inquiry, raised by the further objection of the plaintiff that the effect of the proceedings authorized by the act in question is to deprive the party against whom the warrant issues of his liberty and property without due process of law, and therefore is in conflict with the Fifth Article of the Amendment of the Constitution. To what principles then are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution

itself, to see whether this process can be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown to have been (un) suited to their civil and political condition by having been acted on by them after their settlement of this country. We apprehend (ed) there has been no period since the establishment of the English monarchy where there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult at this day to trace with precision all the proceedings had for these purposes in the earliest age of the common law. That they were summary and severe, and had been used for purposes of oppression is inferable from the fact that one chapter of Magna Charta treats of their restraint. It is certain that this diversity in the law of the land between public defaulters and ordinary debtors was understood in this country and entered into the legislation of the Colonies and provinces, and more especially of the states, after the Declaration of Independence and before the foundation of the Constitution of the United States. Tested by the common and the statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 can not be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a Collector of Customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though due process of law generally implies and includes actor, *reus*, judex, regular allegations, opportunity to *answer*, and a trial according to

some settled course of judicial proceedings (citing various authorities), yet this is not universally true. There may be, and we have seen that there are cases under the law of England after Magna Charta, and it was brought to this country and acted on here, in which *process* in its *nature* final, issues against the body, lands, and goods of certain public debtors without any such trial."

On which the author, Mr. Taylor, comments as follows:

"Such was the process of reasoning by which the court convinced itself that the case of Swartwout, who was found to be indebted to the government in the sum of $1,374,119.05 by mere administrative officers armed with no judicial power, was an exception to the general rule of due process, including 'actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding' because of a 'diversity in the 'law of the land' between public defaulters and ordinary debtors.' 18 Howard 272. In other words, when mere auditing officers ascertain the fact that a collector of the public revenue is a defaulter, and issue final process for the collection of the balance so ascertained against him, he is ipso facto deprived of due process which the law of the land would guarantee him in any other case."

He further says on page 190:

"Due process as now understood throughout the English speaking world had its origin in Chapter 39 of the Great Charter of Liberties of 1215, which provided that 'No freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed or banished or in any way molested; and *we will not set forth against him, nor send against him,* unless by the lawful judgment of his peers and by the law of the land.'"

What was the meaning at the time they were used of these italicised words? In explaining them the foremost commentator on Magna Carta (McKechnie Magna Carta, 437-8) has said: "Its main object (chapter 39) was to prohibit John from resorting to what is sometimes known in Scotland as 'Jeddart Justice.' *It forbade him for the future to place execution before judgment* * * * *Judgment must precede execution.* (Italics ours). In some isolated cases, happily not numerous, John proceeded or threatened to proceed by force of arms against recalcitrants as though assured of their guilt without waiting for legal procedure."

We have quoted at some length from this decision of the Supreme Court of the United States and the comments of this eminent text writer thereon, for the reason that we conceive the quotations to be very pertinent to the case at bar; and whichever position—that of the Court or the author is held to be correct, our contention in the present case is sustained, for they both agree that such a proceeding as the present one violates due process of law as between private persons, and the difference is as to whether the rule is different in the case of debts due the government.

It will seem that the proceeding is contrary to the provisions of Magna Carta. To issue a general execution in the nature of final process against a defendant before any judgment is rendered is to "send against him" without the judgment of his peers or the law of the land. The true and fundamental rule of the common law is "*judgment must precede execution.*" (Italics ours).

An execution (general and in personam) can be issued only on final judgment.

Freeman on Executions. (3rd ed.) Sec. 16, 1. 45.

This act of 1919 and the proceeding of the state superintendent of banks thereunder in effect gives to the superintendent (for the bank) a general judgment and final execution before there is any opportunity for any sort of trial and before any court has concerned itself with the matter in any way; it does then provide that the defendant can go into court and get a trial. It gives to the plaintiff a judgment and execution ex parte. It then places on defendant the burden of going into court and proving that he is not indebted to the plaintiff; the universal rule of the common law is that the burden is on the plaintiff to go into Court and show that the defendant is indebted to him; and an act that gives him the right to a judgment merely by asking for it and without going to court at all; though it does provide a method for the defendant to get rid of the judgment, is contrary to the whole spirit of the common law, and the genius of American institutions, and flies in the teeth of the "due process" clause of the Constitution.

The law of the land authorizes no court to render a judgment or decree against a person or his estate until he has been notified by service of process to appear and defend.

Hollingsworth vs. Barbour, 4 Pet. 466.

A person who has not been served with process actual or constructive, or who has had no notice of proceedings has had no day in court, and therefore can not be bound by a judgment in personam.

Harris vs. Hardeman, 14 Howard 334.

Supreme Court of the United States

OCTOBER TERM, 1927

No. 465

COFFIN BROS. & CO., R. J. DIXON, R. L. GILLEN, ET AL., Plaintiffs in Error

vs.

T. R. BENNETT, SUPERINTENDENT OF BANKS FOR THE STATE OF GEORGIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR DEFENDANT IN ERROR

(32,917)

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STATEMENT OF THE CASE

The Richland State Bank, a Georgia banking corporation, was surrendered by its directors to the Superintendent of Banks for liquidation pursuant to § 2 Art. VII of the Georgia Banking Law. (§2268 (b) Park's Code Supp. 1922.) The Superintendent made an estimate of the value of the assets of the bank which could probably be converted into cash within one year after taking possession of the assets of the bank and the amount of such cash assets which would be available to pay depositors. He then made an assessment upon the stockholders of 100% of the par value of their stock, that amount being estimated by him as necessary to pay the depositors. Notice of this assessment was given by mail to the stockholders. Before the thirty days allowed within which to pay the assessment had expired, the plaintiffs in error, stockholders of the bank, filed an equitable petition in the Superior Court of Fulton County, Georgia, to enjoin the Superintendent from issuing executions against them. No complaint was made as to the necessity of the assessment or the amount thereof, nor of the liability of the several plaintiffs as stockholders. The sole ground upon which injunction was sought was that the section of the Banking Law which authorized the Superintendent to issue executions to enforce the payment of the assessment was unconstitutional in that it denied to the stockholders due process of law in violation of the 14th Amendment, as well as of the similar provision of the Constitution of Georgia. It was also claimed that the issuance of the executions was a judicial act and, therefore, in violation of the Constitution of Georgia which provided that the executive, legislative and judicial branches of the government shall forever remain separate. The Superintendent of Banks demurred to the petition and filed an answer, admitting the facts but denying the legal conclusions. The case was submitted on the pleadings, the demurrer was sustained, injunction was denied, and the case dismissed. Plaintiffs excepted and on appeal the Supreme Court of Georgia, in an opinion in which all the Justices concurred, affirmed the decision of the trial

court. Thereupon, plaintiffs sued out a writ of error to this court to review the judgment of the Supreme Court of Georgia. Officially reported in 164 Ga. 350.

THE ERRORS ASSIGNED

In the statement of points to be relied upon, plaintiffs in error insist that Section 20 of Article VII of the Georgia Banking Law denies them due process of law because under that section the Superintendent of Banks is given the right to issue executions against the stockholders of an insolvent bank to collect the assessments levied by him against the stockholders, which execution is a lien on the property of the stockholders.

THE SECTION UNDER ATTACK

Section 20 of Article VII of the Georgia Banking Act of 1919, as amended by the Act of 1925, which plaintiffs insist denies them due process of law, is as follows:

> "Within ninety (90) days after the Superintendent of Banks has taken possession of the assets and business of any bank, as in this act authorized, he shall make a careful estimate of the value of the cash assets of said bank which can probably be converted into cash within one year after so taking possession of the assets and business of said bank, and of the amount of such cash assets which will be available to pay depositors, and he shall immediately thereupon make an assessment upon the stockholders of said bank sufficient, when added to the cash assets so available for depositors, to pay the said depositors in full, provided that such assessment shall not exceed the liability of stockholders upon their said stock. Notice of such assessment shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment within thirty (30) days after the levy of such assessment and notice thereof, the Superintendent of Banks shall issue an execution against such stockholders for

the amount of such assessment, which shall be enforced in like manner as executions issued by the Superior Courts of this State upon judgments regularly rendered by said courts; provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions, to contest his liability for such assessment and the amount and necessity thereof. Where an affidavit of illegality is filed with the levying officer he shall return the same, together with the execution, to the Superior Court of the County of the residence of the stockholder to be there tried as illegalities filed to executions issued on judgments rendered by said courts are tried. Said executions shall be a lien on all property of the defendant subject to levy and sale for the amount which shall be adjudged to be due thereon from the date of the issuance thereof by the Superintendent. If at any time prior to the final payment of all the indebtedness of such bank it shall appear to the Superintendent that the assessment made by him is insufficient in amount to pay such depositors in full, said Superintendent may from time to time make other assessments not in excess of the liability of the stockholders upon their stock, which shall be enforced and collected in like manner.

"After all the indebtedness of such bank is paid in full, the remaining assets of such bank shall be applied first to reimbursing the stockholders who have paid such assessment or assessments, and thereafter pro rata to all the stockholders.

"Provided, that the lien provided for in this section shall not be good as against third persons without actual notice of the same, until the said execution has been entered on the General Execution Docket in the office of the clerk of the Superior Court in the County of the defendant's residence, and as to real estate of the defendant, in the County where the land lies.

"Provided, however, that the provisions of this section shall not apply to any bank or banks which has

heretofore been closed and which is now in process of liquidation."

§ *2268 (t) Park's Code Supp. 1926 (Vol. 12).*

BRIEF OF THE ARGUMENT

I.

THE GEORGIA BANKING LAW

In 1919 Georgia adopted a comprehensive banking code modeled in large part after the National Bank Act and the Banking Act of New York State. A great many of its provisions are taken literally from one or the other of these Acts. This has been frequently recognized by the Georgia courts. Referring to the section which authorizes the Superintendent of Banks to compromise claims and to sell the real and personal property of an insolvent bank on such terms as the court may direct, the Supreme Court said:

> "The similarity between this Act and the National Bank Act on this subject is striking. This State statute was evidently modeled upon the National Bank Act,"

and the court followed the construction given the National Bank Act by the Federal Courts.

Sessions v. Bennett, 155 Ga., 193.

The similarity of these statutes is especially close in their provisions for the liquidation of insolvent banks. The liquidation provided for by all of them is through an administrative officer acting as the representative of the United States or of the State, the liquidation being extra judicial, though in certain particulars the officer must act with the approval of a court. Under all these acts the liquidator is a statutory receiver and not an officer of the court. His powers, jurisdiction and authority are derived from the statute and not from the court. Mr. Chief Justice

Fuller, referring to the status of a receiver appointed by the Comptroller of the Currency, said:

> "The receiver was not the officer of any court, but the agent and officer of the United States."

In re Chetwood, 165 U. S. 443; 41 L. Ed. 782.

The Supreme Court of New York, construing the Banking Act of that State, said:

> "The former common-law right of banking is now a franchise derived from the Legislature, and the Superintendent is the head of the department for the state regulation of such franchise. He is not a part of the judicial branch of the government. He does not take his office nor derive any of his original powers from it. He is of the administrative branch of the government, appointed by the Governor and confirmed by the Senate. Section 10, Banking Law. He is a state officer. Article 1, Section 2, Public Officers Law; People ex rel. Baird v. Nixon, 158 N. Y., 221, 52 N. E. 1117. And as such officer he is expressly clothed by the Legislature with this power of liquidation."

In re Union Bank, 163 N. Y. Sup., 485, 488.

Following these decisions, the Supreme Court of Georgia has said:

> "When the Superintendent of Banks takes possession of an insolvent bank for the purpose of liquidating its affairs he acts in the capacity of a statutory receiver. . . . The Superintendent of Banks in taking charge of the affairs of an insolvent bank for liquidation is the agent of the state. He acts for and in behalf of the commonwealth. His possession is that of the state, who is his principal."

Bennett v. Green, 156 Ga., 572, 578, 579.

Under the Georgia Banking Law the stockholders are liable, equally and ratably, to depositors in an amount equal to the face value of their respective shares over and beyond

the par value of the stock. Section 1, Article XVIII, imposing this liability is quoted in full in the margin.*

The Superintendent of Banks is authorized to enforce this liability. The section giving him this right and prescribing the method of its exercise has already been set out in full.

II.

THE SECTION AS ORIGINALLY ENACTED

Section 20, Article VII, as it appeared in the Act of 1919, after authorizing the Superintendent of Banks to assess the stockholders such an amount as, together with the cash assets, he estimated would be necessary to pay the depositors, provided:

> "Notice of such assessment shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment within thirty (30) days after the levy of such assessment and notice thereof, the Superintendent of Banks shall issue an execution against such stockholders for the amount of such assessment,

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* A bank incorporated under this Act shall be responsible to its creditors to the extent of its capital and its assets; and each stockholder shall be individually liable for all the debts of said bank to the extent of the balance remaining unpaid on his or her shares of stock; and said stockholders shall be further and additionally individually liable, equally and ratably and not one for another to depositors of such bank for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock; it being the true intent and purpose of this section, that as to depositors for all moneys deposited with said bank there shall be an individual liability upon each stockholder of such bank, over and beyond the par value of his or her original shares of stock equal in amount to the face value of said shares of stock; provided, that said liability of the stockholders shall not prevent depositors from having equal right with all other creditors upon capital, property and assets of said bank; provided further, that the funds realized from the stockholder's liability, as herein provided for, shall not be distributed to those depositors holding a preference or a priority given them by law or otherwise, nor to any depositor holding assets of said bank pledged as security for said deposit except to the extent of the amount of the excess of said deposit over the value of such security, and this provision shall apply, irrespective of whether the bank was or was not incorporated under this Act.

§ *2279 (a) Park's Code Supp. 1926 (Vol. 12).*

which shall be enforced in like manner as executions issued by the Superior Courts of this State upon judgments regularly rendered by said courts; provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions, to contest his liability for such assessment, but not the correctness of the estimate made by such Superintendent or the amount of such assessment, which estimate and the amount of such assessment shall be final and conclusive upon the stockholders. If at any time prior to the final payment of all the indebtedness of such bank, it shall appear to the Superintendent that the assessment made by him is insufficient in amount to pay such depositors in full, said Superintendent may from time to time make other assessments not in excess of the liability of the stockholders upon their stock, which shall be enforced and collected in like manner.

"After all the indebtedness of such bank is paid in full, the remaining assets of such bank shall be applied first to re-imbursing the stockholders who have paid such assessment or assessments, and thereafter pro rata to all the stockholders."

§ *2268 (t) Park's Code Supp. 1922 (Vol. 8).*

This section was called in question as denying the stockholders due process of law. In the case of

Bennett, Supt. v. Wheatley, 514 Ga. 591,

the majority of the court, speaking through Mr. Justice Hines, held that the proviso which gave to the stockholder the right by affidavit of illegality to contest his liability for the assessment "but not the correctness of the estimate made by such Superintendent or the amount of such assessment, which estimate and the amount of such assessment shall be final and conclusive upon the stockholder," afforded an ample remedy to contest the liability. It was further held that "when an execution issues against a stockholder and he files an affidavit of illegality thereto, when levied the same becomes mesne process, which may be returned

to the Superior or other proper court of the county of the residence of the stockholder for trial." A dissenting opinion was filed by Mr. Justice Hill, with whom concurred Mr. Justice Gilbert, who were unable to agree with the majority that a sufficient remedy was afforded by an affidavit of illegality, for the reason that the estimate made by the Superintendent of Banks and the amount of the assessment levied by him was made final and conclusive upon the stockholders, and because "there is no provision for hearing except by affidavit of illegality and no venue is fixed in any county or in any court for hearing and determining the issues that may be raised by the illegality."

The section was also called in question as violating the due process clause before the United States District Court for the Northern District of Georgia. In a decision by King, Circuit Judge, with whom concurred Bryan, C. J., and Sibley, D. J., it was held that the section was not unconstitutional though the estimate of the Superintendent and the amount of the assessment based thereon was made conclusive, in view of the further provision that any surplus after paying the depositors should be applied to reimbursing the stockholders who had paid their assessments. It was further held that the remedy by affidavit of illegality was sufficient.

Martin v. Bennett, Supt. 291 Fed. 626.

The question was again considered by the Georgia Supreme Court in

Bennett, Supt., v. Schwarz, 154 Ga. 855.

In this case the present Chief Justice (Russell), who had succeeded Mr. Chief Justice Fish since the decision in the Wheatley case, agreed with the dissenting opinion in that case. The court being evenly divided in opinion, the judgment of the court below was affirmed by operation of law. A petition for certiorari in this case was denied.

Bennett v. Schwarz, 265 U. S. 586.

In several other cases the question came before the court.

In all of them there was the same equal division of opinion and consequent affirmance of the lower court. The only points of difference between the members of the court in these cases were:

(a) Whether the remedy afforded by affidavit of illegality gave to the stockholder "due process of law" in view of the fact that the estimate made by the Superintendent of Banks and the amount of the assessment could not be contested, but was made expressly final and conclusive, and

(b) Whether the affidavit of illegality afforded any remedy because the act did not make it returnable to any court or provide where the issue should be tried.

It was to meet these objections to the constitutionality of the section that the amendment approved August 26, 1925, was adopted.

III.

THE SECTION AS AMENDED

The Act of August 26, 1925, struck from Section 20, Article 7, the following:

"* * * but not the correctness of the estimate made by such Superintendent or the amount of such assessment, which estimate and the amount of each assessment shall be final and conclusive upon the stockholders."

And inserted in lieu thereof

"and the amount and necessity thereof. Where an affidavit of illegality is filed with the levying officer he shall return the same, together with the execution, to the Superior Court of the county of the residence of the stockholder, to be there tried as illegalities filed to executions issued on judgments rendered by said courts are tried. Said executions shall be a lien on all property of the defendant subject to levy and sale for the

amount which shall be adjudged to be due thereon from the date of the issuance thereof by the Superintendent."

The section, so far as applicable to this discussion, being now as follows:

"Notice of such assessment shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment within thirty (30) days after the levy of such assessment and notice thereof, the Superintendent of Banks shall issue an execution against such stockholders for the amount of such assessment, which shall be enforced in like manner as executions issued by the Superior Courts of this State upon judgments regularly rendered by said courts; provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions, to contest his liability for such assessment and the amount and necessity thereof. Where an affidavit of illegality is filed with the levying officer he shall return the same, together with the execution, to the Superior Court of the County of the residence of the stockholder, to be there tried as illegalities filed to executions issued on judgments rendered by said courts are tried."

The manifest purpose of the General Assembly was to meet the two objections to the constitutionality of the section which had been urged by Mr. Justice Hill in the dissenting opinion in the Wheatley case and with which the Chief Justice had agreed in the Schwarz case. It struck out the provision making the correctness of the estimate of the Superintendent and the amount of the assessment final and conclusive, and in terms gave to the stockholders the right to contest both the necessity and the amount thereof. Since this amendment there is no question which the stockholder cannot raise. No act of the Superintendent can conclude him. He is given his "day in court" and the full right to question every step in the proceeding looking to the final enforcement of his liability to depositors. The

doubt as to the venue was also removed, the amendment providing that the illegality shall be returned to the Superior Court of the county of the stockholder's residence and there tried as other illegalities to executions issued on judgments rendered by said court.

Under the section as amended the Supreme Court in the instant case held, unanimously, that the section is not unconstitutional as denying stockholders due process of law.

Coffin Bros. v. Bennett, 164 Ga. 350.

In a previous case which arose before the amendment of 1925, the court, speaking through Mr. Chief Justice Russell, said:

> "The Act of 1925 cured the defects alluded to by the writer in Bennett v. Schwarz."
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> *Felton v. Bennett, 163 Ga. 849.*

IV.

THE STOCKHOLDER IS GIVEN AN ADEQUATE REMEDY TO CONTEST HIS LIABILITY

This court has frequently said that due process is not necessarily judicial process.

> "That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. Murray's Lessee v. Hoboken Co., 18 How. 272, 280; Bushnell v. Leland, 164 U. S. 684. As was said by Judge Cooley, in Weimer v. Bunbury, 30 Michigan, 201: 'There is nothing in these words ('due process of law'), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the

action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress.' If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

Public Clearing House v. Coyne, 194 U. S. 497, 508-509.

The Georgia Superintendent of Banks as an administrative officer representing the State is authorized to make the assessment, and if it is not paid pursuant to notice within the time allowed, to enforce the collection of the amount by an execution or warrant issued by him. The purpose is that there may be a speedy and economical liquidation and settlement of the affairs of an insolvent bank. The Superintendent of Banks occupies precisely the position of the Comptroller of the Currency except that the judgment of the Comptroller as to the necessity and the amount of the assessment is conclusive, while under the Georgia statute the stockholder may question both the necessity and the amount. In the case in which it was first held that the Comptroller's estimate is conclusive it was said:

"A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it."

Kennedy v. Gibson, 8 Wall. 498.

It also has been held that the order of a court making an assessment is conclusive on stockholders without personal notice to them.

Great Western Telegraph Co. v. Purdy, 162 U. S. 329.

In the "Minnesota Corporation Cases" it was said:

"By becoming a member of a Minnesota corpora-

tion and assuming the liability attaching to such membership, he became subject to such regulations as the state may lawfully make to render the liability effectual."

Bernheimer v. Converse, 206 U. S. 516.

"1. The statute is but a reasonable regulation of the mode and means of enforcing the double liability assessment by those who became stockholders in a Minnesota corporation. While the order levying the assessment is made conclusive as against all stockholders of all matters relating to the amount and propriety of the assessment and the necessity therefor, a stockholder may urge any defense personal to himself. 2. Order valid though stockholder not a party nor notified that assessment contemplated. 3. Means of enforcing liability subject to legislative regulation."

Converse v. Hamilton, 224 U. S. 243 (h.n.).

See also:

Selig v. Hamilton, 234 U. S. 652.

The same conclusion had been reached by the Supreme Court of Minnesota.

Straw, etc., Co. v. L. D. Kelbourne, etc., Co., 80 Minn, 125, 83 N. W. 36.

V.

FORMS OF PROCEDURE IN STATE COURTS ARE NOT CONTROLLED BY THE 14TH AMENDMENT.

This court has said:

"The 14th Amendment to the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of of procedure adopted for these purposes gives reason-

able notice and affords fair opportunity to be heard, before the issues are decided."

Iowa Central R. Co. v. Iowa, 160 U. S. 389 (h.n.).,

Similar language was used in:

Louisville, etc. R. Co. v. Schmidt, 177 U. S. 230.

And in:

Brown v. New Jersey, 175 U. S., 172.

The fundamental requirement of "due process" is an opportunity for hearing and defense.

Ballard v. Hunter, 204 U. S. 241.

"The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied the court is governed by the substance of things, not by mere form."

Simon v. Craft, 182 U. S., 427.

"Due process" is afforded if at any stage of the proceeding before final judgment an opportunity to defend is given.

Hager v. Reclamation Dist. 111 U. S. 701.

"It is scarcely necessary to say that this court when asked to review proceedings in state courts have always held that due process of law is afforded litigants if they have opportunity to be heard at any time before final judgment is entered."

Wilson v. Standefer, 184 U. S. 399, 415.

The court, speaking through Mr. Justice Stone, in a recent case, seems to have stated the whole law in a single paragraph. It was there said:

"It has been so often pointed out in the opinions of this court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure as to make unnecessary any extended discussion of the question here presented. The due

process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

Missouri Ex rel. Hurwetz v. North, 271, U. S. 40.

VI.

THE SECTION COMPLIES WITH THE FUNDAMENTAL REQUIREMENTS OF DUE PROCESS.

While an administrative officer is authorized to make an estimate of the amount needed to pay depositors and to assess the stockholders, the section requires that notice be given to the stockholders who are allowed thirty days within which to pay the amount assessed. If a stockholder does not pay, the Superintendent of Banks may issue an execution for the collection of the amount, but the stockholder by filing a simple affidavit may contest the necessity for the assessment or the amount thereof, and may urge any matter of defense which he could make were he a defendant in an ordinary suit at law. Before his property is taken, therefore, he is given notice and an opportunity to be heard and to defend to the fullest possible extent, and if it should happen that more is collected than is needed to pay depositors, the excess must be returned to the stockholders paying their assessments. Surely this complies with the fundamental requirements of due process of law as repeatedly defined by this court.

It is insisted, however, that as the execution, which the Superintendent of Banks is authorized to issue, is a lien upon the property of the stockholder, he is deprived of due process of law, although he may contest the validity of the lien and make any and every defense to the assessment which he could do as a defendant in an ordinary suit. This is the narrow question presented by this record.

The right to begin suit by a seizure of defendant's property or by fixing a lien thereon is well recognized in Georgia practice, as indeed it seems to be in most, perhaps in all, of the states.

> "Although, as stated in the preceding paragraph, it is the general rule that every one is entitled to a hearing as an essential part of due process of law, a statute is not unconstitutional merely because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined. This is done in cases of attachment and replevin, without objection, and is a matter in the discretion of the legislative power in creating remedies. A party must not be deprived of his property without a judicial hearing, but the stage of proceedings at which that hearing shall take place, and the manner in which the cause of a party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are with the legislative power. Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered, but a hearing, or an opportunity to be heard, prior to judgment, is absolutely essential."
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> *6 R. C. L., p. 451 § 447.*

The quotation is in the language of the Supreme Court of Indiana.

> *Flournoy v. Jeffersonville, 17 Ind. 169: 79 Am. Dec. 468.*

In Georgia attachments may issue creating liens on property of the defendants under a variety of circumstances; against non-residents, persons absconding, concealing themselves, or resisting arrest, persons removing out of the county, or removing their property out of the state. § 5055 Park's Ann. Code. Against fraudulent debtors. § 5088. Against persons creating fraudulent liens on property. § 5889. For the recovery of purchase money. §§ 5083-5084.

Distress warrants for rent, creating a lien on a tenant's property, may be issued without notice and with no opportunity, in advance, of being heard. § 5390 Park's Ann. Code. Mortgages on personal property are foreclosed by the filing of an affidavit upon which the clerk issues an execution. § 3286. Numerous statutory liens on personalty are also foreclosed by the filing of an affidavit and the issuance of an execution by a ministerial officer. § 3366.

There is also provision for the issuance of executions by public officers in numerous instances. Among these may be mentioned the right of the Governor to issue an execution against the State Treasurer and the sureties on his bond. § 224 Park's Ann. Code. And a similar right to issue an execution against a bank which is a depository of state funds. § 1252. So the Comptroller General may issue executions against a defaulting Tax Collector and his sureties. §§ 1184-1191. County Tax Collectors issue executions for the collection of state and county taxes. §§ 1151-1152. And municipal tax officers for the collection of taxes due the municipalities. Assessments for public improvements, paving, sidewalks, sewers, etc., are collected by executions similarly issued. § 869. And the county authorities may issue summary executions against any person holding county funds. §§ 523 and 524. In such cases notice is not necessary.

Walden v. Lee, 60 Ga. 296.

Price v. Douglas County, 77 Ga. 163.

Under the Act of 1876 (Georgia Laws, p. 46) executions could be issued against the lessees of state convicts for amounts due the state, without previous notice.

Under Sections 2251, et seq., of Park's Ann. Code, where notice of a suit against a corporation has been given to stockholders by publication and judgment has been rendered and execution issued against the corporation and an entry of nulla bona is made thereon, execution may be issued against the stockholders.

VII.

THE AFFIDAVIT OF ILLEGALITY IN GEORGIA PRACTICE

The affidavit of illegality as a means of contesting an execution or writ of fieri faceas is a statutory remedy peculiar to Georgia. It was introduced by the General Judiciary Act of 1799, an act, by the way, which abolished forms of action and special pleading at law, substituting what is now known as the Code or American System of Pleading, fifty years before Field's New York Code was adopted. The purpose of the affidavit of illegality was to obviate the necessity of resorting to a bill in equity to cancel a fi. fa. Whenever an execution has been issued illegally or is proceeded illegally, the defendant may arrest it by filing with the levying officer his affidavit, setting forth that it was so issued or is so proceeding and how. § 5305 Park's Ann. Code. The officer must then return the fi. fa. and the affidavit to the court for determination of the question. If the facts stated in the affidavit are controverted a traverse must be filed and the issue thus made is tried by a jury. § 5307.

The Act of 1799, and many subsequent acts, also provided for affidavits of illegality to summary executions issued by administrative officers for the collection of money due the public, as well as to distress warrants, executions issued on the foreclosure of chattel mortgages and of statutory liens. When so filed these summary executions become mesne process—a method of commencing suit. The defendant under such an affidavit to a summary execution can raise any question of law or fact which he could have urged if suit had been brought against him for the collection of the amount alleged to be due.

In speaking of an affidavit filed to an execution issued on a mortgage foreclosure, the Supreme Court of Georgia said:

> "If an affidavit of illegality is interposed in accordance with the statute, this process ceases to be final

and becomes mesne process and the case is returned to proper court for trial."

Crawford v. Scott, 137 Ga. 760, 762.

Similar language is used with reference to a counter affidavit filed to a distress warrant.

Smith v. Green, 34 Ga. 178.

In discussing executions issued against stockholders under §§ 2251-2256, where judgment has been entered against the corporation and the execution has been returned unsatisfied, the court said:

"Do the words 'affidavit of illegality,' there mean the affidavit of illegality authorized by § 3664 (now § 2251) to executions issued on ordinary judgments? We think not. The cases are wholly dissimilar. The defendant in the ordinary execution has had his day in court by regular, personal service, and copy of the writ. In the cases provided for in the section under discussion, the notice is in a newspaper, after commencement of the suit, and the party had even no right to defend, unless his principal fails or refuses. We think the kind of illegality referred to is the illegality authorized in personal property mortgage executions, steamboat lien executions, and all that class of cases of which we now have so many, where an execution is only a mode of commencing a suit, and the defendant making the affidavit has all the rights on the trial as an ordinary defendant. He may plead, amend, and set up his rights in full, and is not bound as to any of his personal rights by the judgment against the corporation any more than he would have been had such a judgment been granted in the ordinary way against the bank, a return of no property been made on it, and then an ordinary suit brought against him, on his charter liability as security for the ultimate redemption of the bills."

Heard v. Sibley, 52 Ga. 310, 313.

Wheatley v. Glover, 125 Ga., 710, 719-724.

Of course if no counter affidavit is filed the process is final.

Ford v. Fargason, 120 Ga. 606 (2).

Bank of Forsyth v. Gammage, 109 Ga. 220.

The Georgia court has held repeatedly and consistently that where the defendant has the right to contest his liability by affidavit of illegality, he is not denied due process of law. Where an execution was issued against a Tax Collector and his sureties, the court said:

> "The execution to which the affidavit of illegality was filed was issued in conformity with the statute in such cases made and provided. The defendant can raise all questions proper for his defense by an affidavit of illegality, as he has done; and in no respect, in the affidavit pointed out, has due process of law been denied him."

McWhorter v. Chattooga County, 154 Ga. 289 (1).

And where a similar execution was issued against a County Treasurer, it was said:

> "The statute authorizing the summary issuance of an execution against a defaulting county treasurer by the ordinary or county commissioners, as the case may be, accords to the defendant the right to test his liability by affidavit of illegality, returnable to the superior court of the county in which the fi. fa. issues, and is not unconstitutional as denying the defendant due process of law."

Roberts v. Dancer, 144 Ga. 341, 342 (7).

Where an execution was issued against a banker for county money held by him, the court said:

> "It was not essential to the constitutionality of the sections of the code above referred to, that provision should be made for a trial by jury before the issuance of the execution. It is sufficient if provision is made for a jury trial at some stage of the proceeding, and

> the defendant allowed to make all his defenses before the liability becomes fixed and final. Under § 525, he can make any defense which could be made in an ordinary suit. He is therefore fully protected in his constitutional rights."
>
> *Hobbs & Tucker v. Dougherty Co., 98 Ga. 574.*

The executions issued by the Superintendent of Banks against stockholders to collect the assessments made by him for the payment of depositors, belong to the class of summary executions issued by public officers. Under the affidavit of illegality the stockholder may contest his liability as fully as he could if sued for the recovery of the amount of the assessment. The execution becomes mesne process when the affidavit is filed. This was the view taken by the United States District Court, who upheld the right of the Superintendent of Banks to issue executions against stockholders even before the amendment of 1925. Circuit Judge King, speaking for the court, said:

> "The issuance of executions by officers as a means of instituting proceedings, with a provision that the defendant therein may interpose an affidavit of illegality or similar defense, is quite familiar to the jurisprudence of Georgia. It is one method of instituting certain kinds of suits. Heard v. Sibley, 52 Ga. 310; Stone v. Davidson, 56 Ga. 182; Wheatley v. Glover, 125 Ga. 710; 54 S. E. 626."
>
> *Martin v. Bennett, 291 Fed. 626, 630.*

This was also the view taken by the Supreme Court of Georgia in the instant case. Said Mr. Justice Hines, speaking for the court:

> "The section does not provide for rendition of judgments in personam against the stockholders . . . but provides only for summary issuance of executions against stockholders of such banks as a mode only of commencing against them suits to enforce their statutory liability to depositors."

VIII.

THE LIABILITY OF STOCKHOLDERS IS CONTRACTUAL

While the individual liability of stockholders is imposed by statute, it is in its nature contractual and is so considered by the Supreme Court of Georgia:

> "Properly considered, a stockholder's liability for his stock and assessments thereon, though fixed by statute, should be regarded as contractual. There is a contract running against each stockholder in a banking corporation in this State to the corporation itself, creditors of such corporation, and depositors as a special class of creditors."
>
> *Crawford v. Swicord, 147 Ga. 548, 551.*

Construing the section of the National Bank Act imposing a similar liability, this court held:

> "Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation."
>
> *Richmond v. Irons, 121 U. S. 27, 55.*

And it has also been said by this court:

> "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Concord First Natl. Bank v. Hawkins, 174 U. S. 364, 372.

After quoting from the above cited decisions of this court, the Supreme Court of Georgia, speaking through Mr. Justice George, said:

> "While the liability is statutory, it is nevertheless contractural in its nature, at least in a qualified or limited sense. See McDonald v. Thompson, 184 U. S. 71 (22 Sup. Ct. 297, 46 L. ed. 437); Studebaker v. Perry, 184 U. S. 258, (22 Sup. Ct. 463, 46 L. ed. 528); Platt v. Wilmot, 193 U. S. 602, (24 Sup. Ct. 542, 48 L. ed. 809); McClaine v. Rankin, 197 U. S. 154, (25 Sup. Ct. 410, 49 L. ed. 702); Christopher v. Norvell, 201 U. S. 216, (26 Sup. Ct. 502, 50 L. ed. 732). The liability of the stockholder of a national bank, though statutory, rests at last on the shareholder's subscription or on his receipt and acceptance of his stock. He agrees to assume and discharge the legal obligations and duties of a shareholder. Deweese v. Smith, 106 Fed. 438."

Duncan v. Freeman, 152 Ga. 332, 336.

The plaintiffs in error are stockholders of the Richland State Bank. Under these decisions when they subscribed for or purchased their stock they assumed a contractural relation to the depositors of the bank. They not only agreed to pay such an assessment as might be necessary to satisfy the claims of the depositors, but they also agreed as to the method by which the assessment should be made and the liability enforced.

Minnesota Corporation Cases, supra.

Deweese v. Smith, 106 Fed. (8 C. C. A.) 438.

There is no suggestion in the original or amended petition that they are not stockholders, or that the assessment is unnecessary, or that too large an amount has been assessed, or that they are not liable for the assessment as made. The only complaint is as to the machinery provided for the collection of the assessment. The petition admits that the notice was given and that they had an opportunity

of paying the amount which they are due. Copy of the notice served on the stockholders is attached to the petition (R. p. 11). Plaintiffs admit receiving these notices (Par. 4 of Petition, R. p. 8). The statute gives them the right to contest the assessment in any way or for any reason, and to interpose any and every defense which they may have. In the event it should develop that a larger amount is collected than is required to pay depositors, every dollar of the excess will be returned to the stockholders who paid it. The Supreme Court of Georgia has held that the procedure provided by the statute is not in violation of the due process of law clause of the State Constitution. Yet it is insisted that this means of collecting the contractural liability of these stockholders violates the 14th Amendment. To state the proposition is to answer it.

We respectfully submit that the section of the Banking Law under attack does not deprive the plaintiffs of their property without due process of law contrary to the guarantee of the 14th Amendment.

Respectfully submitted,

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